SUPREME COURT, U. S.

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IN F. DAVIS, CLER

Supreme Court of the United States.

OCTOBER TERM, 1969.

No. [redacted]128

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

TIMOTHY J. MURPHY,
RICHARD W. MURPHY,
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Supreme Court of the United States.

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No.

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v.
WILLIAM B. CAMP ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled cause on March 27, 1969.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reprinted in Appendix D appended hereto. The opinion of the District Court is reported in 286 F. Supp. 770 (1968) and is reprinted in the Record herein commencing R. 44.*

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*"R" hereinafter refers to the Appendix to Brief for Plaintiffs-Appellants, filed in the First Circuit Court of Appeals.

Jurisdiction.

The opinion of the Court of Appeals was filed on March 27, 1969, and judgment was entered on March 27, 1969 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Question Presented.

Whether the petitioners have legal standing to challenge (a) the decision of the Comptroller of the United States Currency in allowing national banks to enter the travel agency business and (b) the actual entry of the South Shore National Bank into the travel business.

Statute Involved.

The relevant provisions of the National Bank Act, as amended (12 U.S.C. Sec. 24(7)), are printed as Appendix B to this petition.

The Comptroller's ruling contained in Comptroller's Manual for National Banks, Paragraph No. 7475, is printed as Appendix C to this petition.

Statement of the Case.

The petitioners are forty-two independent travel agents of Massachusetts engaged in the travel agency business. Many of the activities and obligations of the travel agents are controlled by conferences of air and steamship carriers which are in certain instances supervised by the Civil Aeronautics Board and the Federal Maritime Commission (R. 2 and Exhibit A).

The petitioners brought this suit individually and also as a class on behalf of all other Massachusetts firms in the travel business (R. 2-3).

The respondent William B. Camp is the Comptroller of the Currency, who is charged by law with administrative and regulatory authority with respect to national banks. Mr. Camp's predecessor, Comptroller James J. Saxon, a former lobbyist and attorney for the national banks, in 1963 arbitrarily ruled, without notice and without a hearing, that national banks may enter into the travel business on a full-scale basis for profit (R. 14). This decision represented a change in policy on the part of the Comptroller (R. 4).

Rule 67, issued by the Comptroller in 1949, stated: "It is the position of this office that a national bank does not have the legal right to act as agent . . . of transportation companies in the operation of a regular travel agency . . ."

In November, 1966, respondent South Shore National Bank availed itself of the Comptroller's ruling and entered into the travel agency business. Said Bank, with approximately twenty-seven branches, is the first and only bank in Massachusetts to engage in the travel agency business (R. 5). It has entered into the travel business on a large-scale basis and has launched a massive advertising program, complete with seven roadway billboards, full-page newspaper ads and a radio saturation program (R. 5 and Exhibit B).

There are approximately ninety other national banks in Massachusetts with approximately three hundred forty-five branches (R. 6).

The petitioners contend that the Comptroller exceeded his authority in allowing the national banks to enter into the travel business and that the South Shore National Bank is illegally competing with them for travel customers. The

petitioners have lost substantial business and profits and stand to lose even greater business and profits in the future as a result of the South Shore National Bank's illegal entry into the travel business (R. 3, 5, 6, 7, 24, 27).

As a result thereof, on May 8, 1967, the petitioners brought suit for a declaratory judgment and mandatory injunction (R. 2-8).

On July 11, 1968, motions for summary judgment brought by the respondents were allowed by the District Court and a similar motion brought by the petitioners was denied (R. 44, 48-49). The court held that the petitioners had no standing to sue.

From such order of the District Court, the petitioners appealed to the United States Court of Appeals for the First Circuit (R. 49). That court affirmed the judgment of the District Court in a written opinion (Appendix D herein).

Reasons for Granting the Writ.

The issue as to whether small independent businesses have standing to challenge competition presented by the national banks pursuant to authority given by the Comptroller has sprung up all over the country. Inconsistent opinions have been rendered by the various courts based upon varied and diverse reasoning.[1]

The Court of Appeals in the instant case, by its own admission, has rendered a decision in conflict with the de-

[1] Compare *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968), *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966), and *Investment Company Institute* v. *Camp*, 274 F. Supp. 624 (D. D.C. 1967), with *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 279 F. Supp. 675, aff'd, 8th Cir. 2/6/69, F. 2d and *The Wingate Corporation* v. *Industrial National Bank*, F. Supp. (R.I. D.C. 1968), rev'd, 1st Cir. 3/27/69 F. 2d

cision of at least one other Court of Appeals on the same matter.[2] In fact, this Court of Appeals has rendered conflicting decisions within a singular opinion inasmuch as it held that data processing service corporations do have standing to challenge competition by national banks but that travel agents do not have standing to challenge such competition. The obvious anomaly is that the business of data processing is more closely related to the business of banking than is the business of travel service.

With the recent phenomenon of one-bank holding companies and with the growing invasion of conglomerate industries, it is apparent that illegal competition by national banks should be stopped. The Chairman of the Federal Reserve Board, William McChesney Martin, said in opposition to the Comptroller that the entry by the banks into unrelated business ". . . can affect the whole capitalistic system in the United States. The line between banking and commerce should not be erased."[3] The travel agents attempted to prevent the line from being erased but have been denied even the opportunity to raise the issue. This recent trend by national banks to invade business areas totally unrelated to the business of banking poses an important question of federal law, namely, what are the limits of power that Congress has given national banks.

The Court of Appeals said in effect that the national banks have the right to choose what they want to do, both literally and figuratively, and such conduct is "none of plaintiffs' business" (App. D, p. 14). Further the First Circuit implied that the South Shore National Bank is involved in illegal "ultra vires" activity but "even assuming that [they] . . . are prohibited by section 24(7) from en-

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[2] *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968).

[3] Time Magazine, Business Section, p. 101, Nov. 8, 1968.

tering into the [travel] business . . . this is not sufficient to provide a statutory aid to standing" (App. D, p. 17). Such a decision seems to elevate form over substance and constitutes a convenient avoidance by the Federal Court to stop conduct which is obviously illegal and prohibited by Congress. The fine technical distinctions enunciated by the Court of Appeals in explaining why data processing companies do have standing and why travel agents do not have standing provide scholarly fodder for legal research analysts but they provide double-talk and side-stepping to the petitioners and other small businessmen. In getting bogged down in the refinements of the standing issue, the Court has allowed itself to get further and further away from the realities of this age and opens itself to persuasive attack by those who say that the law has no relevance and that the little man is prevented by the government from getting his day in court. One excellent example of overlegalism and confusion in this case is where the First Circuit said that the petitioners have standing to be told they have no standing, but they do not have standing to challenge illegal competition.[4]

The mere fact that there is no explicit law allowing a Comptroller's decision to be judicially reviewed or protecting the travel agents from competition should not prevent this Court from granting standing to the petitioners. In finding standing, this Honorable Court would not be usurping the powers of the Congress because it is clear that the banks' participation in the travel business is illegal. Congress has made it clear that national banks are only to exercise that power specifically given to them by Congress.

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[4] The Court said as follows: "The Comptroller argues at length that this [operating full travel service] is traditional and legitimate bank activity. We do not, however, consider this matter except to say that . . . the question of standing is properly before us." (Appendix D, p. 14.)

As Brandeis, J., said: "The measure of their [national banks] powers is the statutory grant; and powers not conferred by Congress are denied." *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U.S. 245, 253 (1934). Section 24(7) of the National Bank Act (12 U.S.C. Sec. 24) lists numerous powers explicitly granted to banks and as the First Circuit held: "It has long been settled . . . that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking" (App. D, p. 16). Thus, it is clear that national banks are prohibited by Section 24(7) from entering into the travel business. The petitioners are recipients by implication of Congressional protection and accordingly have the requisite statutory aid to standing. *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929).

To affirm the First Circuit's decision would be to permit the national banks to compete illegally in any businesses they wanted to where there were no express laws protecting the damaged businesses. For example, national banks could go into the night club, laundry, liquor or construction business, etc., without fear of reprisal.

The doctrine of standing has been eroded almost completely by its exceptions. Because it is a doctrine of judicial invention and convenience, it has been interpreted and applied in many different ways. This Honorable Court recently attempted to reshape the doctrine in the case of *Flast* v. *Cohen*, 392 U.S. 83 (1968). However, even *Flast* has been interpreted and applied differently.[5]

It is the petitioners' contention that this Honorable Court's new philosophy on the doctrine of "standing" should be applied to the case at bar. Accordingly, since

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[5] Compare Judge Thornberry's concurring opinion in *Saxon* v. *Georgia Association of Independent Insurance Agents*, 399 F. 2d 1010 (5th Cir. 1968), and *Citizens Association of Georgetown* v. *Simonson*, F. 2d (D.C. Cir. 1968).

this case poses sufficient adversity and clarity, the Court of Appeals should have found "standing."

Moreover, petitioners contend that Section 10(a) of the Administrative Procedure Act, 5 U.S.C. Sec. 702, provides standing for any persons claiming to be "adversely affected in fact." This contention has been supported by some federal courts[6] and by Professor Davis in his Administrative Law Treatise.[7] The interpretation and application of Section 10(a) of the Administrative Procedure Act is also in a state of confusion among federal courts and should be resolved by the Supreme Court.[8]

In the case at bar the Court is not burdened with deciding a frivolous issue, a political issue, an abstract issue or an issue where the plaintiffs' interest is "comparatively minute and indeterminable," which are the typical cases wherein the legal roadblock of "standing" is invoked. *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227 (1937). Moreover, "the fear expressed in *Frothingham* that allowing one taxpayer to sue would inundate the federal courts with countless similar suits has been mitigated by the ready availability of the devices of class actions and joinder under the Federal Rules of Civil Procedure . . ." *Flast* v. *Cohen*, 392 U.S. 83, 94 (1968). The instant case involves a real, serious and adverse case and controversy which should not be sidetracked from the judicial artifice of "standing."

In summary, it is submitted that there are many reasons why this case should be reviewed. First, there are con-

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[6] *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346 (D. D.C. 1953); *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966).

[7] Davis, Administrative Law Treatise, sec. 22.02.

[8] Compare *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247 (D. D.C. 1966), with *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F. 2d 686, 692-693 (8th Cir. 1967).

flicting federal decisions on the main issue of standing as it relates to national banks and there are conflicting federal decisions on the subsidiary issue of standing relating to the interpretation and application of the *Flast* case and the Administrative Procedure Act, Sec. 10(a). Second, this case involves an important federal question of national magnitude and of grave concern to our economic leaders. The time is ripe for a national decision involving the national banks.

Conclusion.

It is respectfully submitted that, for the reasons above stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY J. MURPHY,

RICHARD W. MURPHY.

Appendix "A."

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT.

Entered March 27, 1969.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk

Appendix "B."

STATUTE INVOLVED.

Title 12, United States Code, § 24, paragraph Seventh, in pertinent part, states:

> "Upon duly making and filing articles of association and an organization certificate a national banking asso-

ciation shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

. . . . . .

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter."

Appendix "C."

COMPTROLLER'S MANUAL FOR NATIONAL BANKS

No. 7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank.

Appendix D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7192.

ARNOLD TOURS, INC., ET AL.,
PLAINTIFFS, APPELLANTS,
v.
WILLIAM B. CAMP ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

and

No. 7186.

THE WINGATE CORPORATION,
PLAINTIFF, APPELLANT,
v.
INDUSTRIAL NATIONAL BANK ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge*,
WOODBURY,* *Senior Circuit Judge*, and
COFFIN, *Circuit Judge*.

No. 7192.

Richard J. Murphy, with whom *Timothy J. Murphy* was on brief, for appellants.

Alan S. Rosenthal, Attorney, Department of Justice, with whom

*Sitting by designation.

Edwin L. Weisl, Jr., Assistant Attorney General, *Paul F. Markham*, United State Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Elliott V. Grabill, with whom *Arthur H. Bloomberg* and *Grabill, Ley & Butterworth* were on brief, for South Shore National Bank, appellee.

No. 7186.

Edward J. Regan, with whom *Eustace T. Plaikos* and *Graham, Reid, Ewing & Stapleton* were on brief, for appellant.

Matthew W. Goring, with whom *Edward M. Watson, Robert W. Meserve, John B. Newhall, Gordon L. Doerfer, Hinckley, Allen, Salisbury & Parsons* and *Nutter, McClennen & Fish* were on brief, for Industrial National Bank of Rhode Island, appellee.

Alan S. Rosenthal, Attorney, Department of Justice, with whom *Edwin L. Weisl, Jr.*, Assistant Attorney General, *Edward P. Gallogly*, United States Attorney, and *Stephen R. Felsons*, Attorney, Department of Justice, were on brief, for William B. Camp, Comptroller of the Currency, appellee.

Robert J. McOsker, City Solicitor, and *Vincent J. Piccirilli*, Assistant City Solicitor, on brief for City of Providence, appellee.

Matthew Hale on brief for The American Bankers Association, amicus curiae.

March 27, 1969.

ALDRICH, *Chief Judge*. These are two actions by parties engaged in certain business pursuits to restrain competition from national banks which, supported by rulings of the Comptroller of the Currency, have entered their fields. Plaintiffs seek, basically, to attack these rulings. In both cases the district courts held that they were without standing to do so, and dismissed the complaints on motions of the defendants. Plaintiffs appeal.

THE TRAVEL AGENCY BUSINESS

We consider first the action brought by Arnold Tours, Inc. and some forty other independent travel agencies in Massachusetts, allegedly on behalf of others similarly sit-

uated as well as themselves, against the Comptroller and the South Shore National Bank. The bank, in reliance upon a ruling by defendant Comptroller's predecessor,[1] is engaging not merely in the financial aspects of travel, but "full" travel service, or a complete travel agency business. To quote from what is said to be the bank's own announcement, its employees are prepared to arrange for bicycles in Bermuda, villas on the Riviera, and houseboats in Kashmir. The Comptroller argues at length that this is traditional and legitimate bank activity. We do not, however, consider this matter except to say that plaintiffs present enough of an issue so that the question of standing is properly before us. We also note that no question of reviewability of the Comptroller's rulings has been raised. *See generally*, Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367, 383 & n. 60 (1968). Our sole question is the correctness of defendants' contention, which we will paraphrase as saying that what the bank chooses to do is, both literally and figuratively, none of plaintiffs' business.

It has long been settled that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business, in a suit against the competitor, the government, or both. *Railroad Co.* v. *Ellerman*, 1881, 105 U.S. 166; *Alabama Power Co.* v. *Ickes*, 1938, 302 U.S. 464; *Tennessee Power Co.* v. *TVA*, 1939, 306 U.S. 118. Despite numerous exceptions, this principle has withstood

[1] "¶7475. National banks acting as travel agents.

Incident to those powers vested in them under 12 U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection, therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶7376."

erosion not only because of the traditional rationale behind standing doctrines generally, *see Flast* v. *Cohen*, 1968, 392 U.S. 83, 91-101, but because of the policy encouraging free and open competition—a policy that favors competition in the market place, not in the courts. The exceptions, where standing is recognized, are as well established as the principle itself. The first is for complaints of "illegal" competition, by which is usually meant competition that is unlawful as to plaintiff apart from considerations of corporate power or authority. *See Alabama Power Co.* v. *Ickes, supra* at 479; *Central Louisiana Elec. Co.* v. *REA*, W.D.La., 1964, 236 F.Supp. 271, 277, *rev'd*, 5 Cir., 354 F.2d 859, *cert. denied* 385 U.S. 815; *but cf. Kansas City Power & Light Co.* v. *McKay*, D.C.Cir., 1955, 225 F.2d 924, *cert. denied* 350 U.S. 884. Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws. The second exception is where it is claimed that some "legal right" has been injured, by which is meant, in its nonconclusory sense, that plaintiff has an independent property right, or a right to be free from the particular kind of competition he is challenging. Such a right is attached to or arises out of an exclusive franchise, on the one hand, or a restricted license or the like, on the other. *Frost* v. *Corporation Commission*, 1929, 278 U.S. 515; *cf. Whitney National Bank* v. *Bank of New Orleans*, D.C.Cir., 1963, 323 F.2d 290, 299-300, *rev'd on other grounds*, 379 U.S. 411. Plaintiffs fit in no such category.

The final general exception is where the plaintiff can show the existence of a "statutory aid to standing" for a class of persons which includes himself. This statutory aid may take the form of a "judicial review" provision of the particular administrator in question for "parties ag-

grieved," "adversely affected," or the like. In such a case, *FCC* v. *Sanders Bros. Radio Station*, 1940, 309 U.S. 470, would presumably provide standing for legitimate competitors. *See generally, Jaffe, Judicial Control of Administrative Actions*, 513-31. There is, however, no such provision as to the Comptroller of the Currency. An alternative statutory aid may be found if there is an indication of Congressional intent, explicit or implicit, in the relevant substantive acts to grant protection to the competitive interests of a class of businesses which includes the plaintiff. Thus in *Hardin* v. *Kentucky Utilities Co.*, 1968, 390 U.S. 1, the Supreme Court found that a competing private utility company had standing to challenge the expansion of TVA into new areas in alleged violation of the area limitations of section 15d(a) of the Tennessee Valley Authority Act, 16 U.S.C. § 831n-4 (a). The Court said, "[O]ne of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. . . . Since respondent is thus in the class which § 15d is designed to protect, it has standing . . . ." 390 U.S. at 6-7.

The only possible statutory aid to the standing of travel agents in national banking legislation exists in 12 U.S.C. §24(7). This section states that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking," and then lists numerous powers explicitly granted. It has long been settled in suits over private contracts that the enumeration of such powers is an effective and strong prohibition of all activities not enumerated and not incidental to banking. *See First National Bank* v. *National Exchange Bank;* 1875, 92 U.S. 122, 128; *National Bank* v. *Matthews*, 1878, 98 U.S. 621, 625; *Logan County National Bank* v. *Townsend*, 1891,

139 U.S. 67, 73. But even assuming that national banks are prohibited by section 24(7) from entering into the business of procuring travel arrangements, this is not sufficient to provide a statutory aid to standing. The prohibition must be demonstrably intended to protect the competitive interests of other members of the prohibited business. *See* the concurring opinion of Judge Thornberry in *Saxon* v. *Georgia Ass'n. of Independent Ins. Agents*, 1968, 5 Cir., 399 F.2d 1010, 1019; *Association of Data Processing Serv. Organizations* v. *Camp*, D.Minn., 1968, 279 F.Supp. 675, *aff'd*, 8 Cir. 2/6/69, F.2d .. We, too, (see 8th Cir. opinion in *Camp*, n.10), cannot accept the simplistic suggestion by the majority in *Georgia Ass'n*, 399 F.2d at 1016, that as soon as it appears that the competitive activities were unlawfully carried out the plaintiffs have standing.

The plaintiffs have not pointed to, nor have we in our research discovered, any evidence that Congress in delimiting the scope of banking activity in the ultra vires section, quoted *supra*, was concerned, in 1863 and 1864 when the national banks were formed,[2] with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents (if they then existed). Rather, the limitations were for the purpose of insuring the stability, liquidity, and safety of the banks. *See National Bank* v. *Matthews*, *supra* at 626; Davis, Banking Regulation Today: A Banker's View, 31 Law & Contemp. Problems 639 (1966). *See also* Million, The Debate of the National Bank Act of 1863, 2 J. of Pol. Econ. 251 (1894). No doubt Congress has continuously, from 1864 to the present, been "very careful" (see *infra*) in restricting the activities of

[2] National Bank Act of 1863, ch. 58, 12 Stat. 665; National Bank Act of 1864, ch. 106, 13 Stat. 99.

banks; and no doubt Congress has been, as we shall see in the second portion of this opinion, specifically concerned with certain potential competitors of the banks. But as Senator Proxmire pointed out while offering an amendment to banking legislation [3] specifically designed to protect particular competitors, the thrust of the close regulation of banks is for purposes of stability: "We are very careful in the regulations of banks. This has principally been done to assure the solvency of the banks by limiting the activities of banks to safe and relatively liquid investments." 108 Cong. Rec. 22031 (1962). (*See also* S.Rep. No. 2105, 87th Cong., 2d Sess. (1962) (Supplemental views of Senators Proxmire, Douglas, and Neuberger) in 2 U.S. Code Cong. & Admin. News, 1962, at 3887. While at some point Congressional concern with a sufficient quantity of specific competitors of banks might indicate a Congressional intent that section 24(7) should now be read as a measure not only to protect investors but also to protect all potential members of prohibited activities, such a point has not been reached. More proof of Congressional solicitude is required before this court or any court should convert an economic struggle into a legal one.

The plaintiffs have suggested, however, that the general rule denying competitors standing is no longer valid, or has undergone substantial change. First, they argue that section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702 provides standing for any persons claiming to be "adversely affected in fact." This contention seems derived from the interpretation of section 10(a) urged by Professor Davis in his Administrative Law Treatise, § 22.02, and presumably adopted in *American Presi-*

[3] This legislation will form the basis of our holding in the second half of this opinion.

dent Lines v. *FMB*, D.D.C., 1953, 112 F.Supp. 346.[4] We, however, choose to side with Professor Jaffe[5] and the majority of the courts[6] in holding that the passage of the APA was not intended to alter to such a drastic extent previous law on the question of standing. Moreover, we should add that we have serious reservations whether a test of "adversely affected in fact" would provide a simpler means of deciding the issue of standing. We do not pause for such analysis in the present case, but if, as has been suggested, simplicity and ease of determination is a reason for preferring the new interpretation, we do not find it.[7]

The plaintiffs alternatively urge that *Flast* v. *Cohen*, *supra*, indicates a major shift in the judicial attitude toward the general doctrine of standing; and that while it is not directly in point, this decision indicates that the relevant test for determining standing in this situation is whether the parties are sufficiently adverse to bring into focus the issues raised. *See also* the concurrence of Judge Thornberry in *Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, *supra*. Our first response to plaintiffs' contention is that *Flast* v. *Cohen* was not intended to have any major

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[4] *See also Baker, Watts & Co.* v. *Saxon*, D.D.C., 1966, 261 F.Supp. 247.

[5] Jaffe, Judicial Control of Administrative Action 528-30. *See also* Note, Competitors' Standing To Challenge Administrative Action Under the APA, 104 U.Pa.L.Rev. 843 (1956).

[6] *See Saxon* v. *Georgia Ass'n of Independent Ins. Agents*, *supra*, at 1019 n.1; *REA* v. *Northern States Power Co.*, 8 Cir., 1967, 373 F.2d 686, 692-93 & nn. 9-10, cert. denied 387 U.S. 945; *Kansas City Power & Light Co.* v. *McKay*, *supra*.

[7] Indeed, one of the bases for the rule against competitors' suits might well be the difficulty of determining whether mere increased competition is an injury in fact, particularly where a new and largely undeveloped market is involved. Cf. *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 1 Cir., 1966, 358 F.2d 691.

reshaping effect outside the area of standing determinations under Article III for taxpayer suits challenging the constitutionality of a federal taxing and spending statute. Such an approach to standing as used in *Flast*—one focusing solely upon an assessment of the degree of adversity and clarity of the particular case—if applied to questions of administrative law standing would disturb the entire judicial relationship to the administrative as presently understood by Congress. Congress now knows that if it wishes a particular class of plaintiffs to have, or not to have, standing to seek review of agency rulings, it may make, or not make, the types of legislative provisions discussed earlier in this opinion, and that is an end to the matter. Under plaintiffs' proffered approach, the courts would have the last word on standing, based upon their view of the justiciability of the particular circumstances pleaded. When the conflict is one of constitutional dimensions, such an approach may be necessary. In purely administrative matters we think otherwise.

Our second answer is that even if we were to assume that *Flast* v. *Cohen* was intended to affect other areas, we do not read that case to require all administrative standing determinations to be made solely upon an assessment of the degree of adversity and clarity. Rather, *Flast* was concerned with reevaluating the standards for determining adversity and clarity in a situation where the relevant standing doctrine was adjudged to rest entirely upon such considerations. *Flast* is inapplicable when the standing doctrine in question rests upon a basis largely independent of the concerns for adversity and clarity—namely, the limited role of the judiciary in regulating legitimate competition.

In sum, we find no acceptable basis for standing for the travel agents.

DATA PROCESSING

Turning to the second action involving the Comptroller, here plaintiff, Wingate Corporation, which performs certain data processing services for hire, brings suit to enjoin the defendant, Industrial National Bank of Rhode Island, from performing data processing services for the City of Providence, as sanctioned by a general ruling of the Comptroller. While Wingate, like Arnold, complains that the bank is violating section 24(7) of 12 U.S.C. by providing such services to bank customers, its claim to standing is aided by the presence of specific Congressional legislation dealing with banks and computer servicing. In 1962 Congress, after some debate, enacted the Bank Service Corporation Act, 76 Stat. 1132, which allowed small banks to combine to form a separate corporation which could own data processing equipment. The primary purpose of this legislation was to allow small banks to compete more effectively with the larger banks, which had sufficient capital and business to buy their own electric data processing equipment. However, in order to prevent such corporations being used as a subterfuge for entering into the nonbanking business of data processing, and to protect the interests of certified public accounting firms, Congress provided in section 4 of that Act, 12 U.S.C. § 1864, "No bank service corporation may engage in any activity other than the performance of bank services for banks." The legislative history is clear. The prohibition originated in an amendment proposed by the National Society of Public Accountants, which objected to the original version of the bill that would have allowed bank service corporations to solicit outside business to some extent. The

Accountants feared injury to their growing business of bookkeeping with the aid of computers. The final provision was an obvious response. *See* 108 Cong. Rec. 16499, 22031 (1962); Hearings on Misc. Bank Bills Before the Comm. on Banking & Currency of the United States Senate, 87th Cong., 2d Sess., at 79-80 (1962).

We conclude that the present plaintiff is within the class of persons intended to be protected by section 4 of the 1962 legislation, and the only question is whether standing exists to complain not of competition from bank service corporations, but from national banks directly. We conclude in the affirmative. When Congress so explicitly provides protection for a particular business against competition from a regulated national entity—even though indirectly by regulating a subsidiary—standing exists at least to entertain complaints by that business concerning its competitive relationship to the national entity. Section 4 had a broader purpose than regulating only the service corporations. It was also a response to the fears, expressed by a few senators, that without such a prohibition, the bill would have enabled "banks to engage in a nonbanking activity," S.Rep. No. 2105, *supra* (Supplemental views of Senators Proxmire, Douglas, and Neuberger), and thus constitute "a serious exception to the accepted public policy which strictly limits banks to banking." (Supplemental views of Senators Muskie and Clark). We think Congress has provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against.[8]

[8] *But cf. Association of Data Processing Serv. Organizations* v. *Camp*, 8 Cir., 1969, F.2d , n.12, which stated that the reliance of similar plaintiffs upon the Act for standing was "misplaced."

Indeed, there is a plausible argument that the Bank Service Corporation Act, read in conjunction with 12 U.S.C. § 24(7), does in fact impliedly prohibit national banks from directly entering into the data processing service business. If the section four prohibition could be avoided by a small national bank, member of a group owning a service corporation, soliciting its own data processing customers to be serviced by the subsidiary via the bank, the prohibition would be largely illusory. And if a small bank could not directly solicit such customers, it would follow that the large banks, owning their own equipment, could not, or the equalizing effect of the Bank Service Corporation Act would be lost. To be considered in opposition to such an argument is the Comptroller's ruling interpreting the section,[9] and the phenomenon of the one-bank holding company, that is not covered by the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841-49, which requires only multi-bank holding companies to divest themselves of all nonbanking interests. We leave the resolution of this conflict to future determination. For the purposes of the issue of standing, we need decide only that the passage of the Bank Service Corporation Act arguably prohibits direct entry by national banks into the data processing service business.

---

[9] Comptroller's Ruling ¶7399 provides in part that:

"... such corporations may only perform bank services for banks. Bank services, however, as defined in the Act, would include any service which a bank would ordinarily perform for a customer. Accordingly, if a bank undertakes to handle the payroll accounts or the accounts receivable of a customer, a bank service corporation may perform for the bank the service necessary to enable the bank to fulfill its undertaking."

In case No. 7192 the judgment of the District Court is affirmed.

In case No. 7186 the judgment of the District Court is vacated and the case remanded for further proceedings not inconsistent herewith.

SUPREME COURT, U. S.

MAY 19 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1969.

No. [redacted]128

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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ALDEN G. CUTCHELL & SON, INC., LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1969.

No.

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The following is a reprint of the opinion of the District Court submitted as an appendix to the Petition for Writ of Certiorari in accordance with Supreme Court Rule 23 (1)(i).

Opinion.

July 11, 1968

CAFFREY, D.J.

This is a civil action in which 42 named plaintiffs, each engaged in the travel agency business, (i.e., acquiring from any source travel reservations or accommodations; ticket-

for travel by air, sea, bus, or train; hotel, motel, and other lodging accommodations and reservations; and other related services), seek declaratory and injunctive relief against the Comptroller of the Currency and the South Shore National Bank. More particularly, plaintiffs seek a declaration that certain rulings by the Comptroller authorizing national banks to engage in the travel agency business are illegal, null and void, and they seek an order enjoining the Comptroller from authorizing the South Shore National Bank, or any other national bank, to engage in the travel agency business.

The 42 named plaintiffs purport to bring this action as a class action on behalf of all other Massachusetts travel agencies, approximately 250 in number. Jurisdiction of this court is based on 28 U.S.C.A. 1331, 1361, 2201 and 2202, and 5 U.S.C.A. 1009.

The matter came before the Court on cross-motions for summary judgment filed by plaintiffs and by both defendants. In the course of oral argument of these motions all counsel agreed that there is no issue of material fact before this Court, and each party claimed it is entitled to prevail as a matter of law. The complaint alleges that:

> "The action of the Comptroller of the Currency which permitted the defendant, South Shore National Bank, to acquire and maintain a travel department is an illegal activity, and has subjected the plaintiffs to unlawful competition.
>
> "The Comptroller has illegally authorized national banks to engage in the travel agency business through formal rulings contained in the Comptroller's Manual for National Banks, paragraphs 7376 and 7475. These illegal rulings are based on Title 12 U.S.C. sec. 24, paragraph 7, which empowers national banks to perform 'all such incidental powers as shall be necessary

to carry on the business of banking.' The travel agency business is not incidental to the banking business, and thus the Comptroller's ruling is arbitrary, capricious, void, and in excess of his authority."

The complaint further alleges:

"The South Shore National Bank of Quincy, Massachusetts, with twenty-seven branches in surrounding areas, is the first national bank in Massachusetts to engage in the travel agency business. . . .

"The South Shore National Bank has seriously injured and damaged the above-named plaintiffs. . . . Many customers of the plaintiffs have changed their business to said bank because of its convenient financing facilities.

"The Comptroller's action creates for the plaintiffs, and others similarly situated, a type of illegal competition which deprives and will deprive the plaintiffs, and others similarly situated, of legitimate business and opportunities for profit in the travel agency business . . . and

"The plaintiffs have no adequate remedy at law . . ."

On the basis of the lengthy memoranda of law and the oral argument of counsel, it is clear that plaintiffs' basic contention herein is that the Comptroller has exceeded his statutory authority in the rulings under attack, by authorizing national banks to engage in a type of activity which plaintiffs contend does not come within the permissive language of subparagraph 7 of 12 U.S.C.A. 24:

"It shall have power . . . 7th, *to exercise* . . . all such incidental powers as shall be necessary to carry on the business of banking."

It is equally clear that defendants' motion for summary judgment is based essentially on the grounds (1) that plaintiffs do not have standing to maintain this action, under a well-settled line of decisions of the Supreme Court of the United States, and (2) that, in any event, defendants are entitled to judgment because national banks are authorized to render travel agency services to the public since the enactment of the National Bank Act in 1864.

The National Bank Act contains no specific provisions for judicial review of the Comptroller's rulings, nor does it purport to specifically confer standing on any private parties, such as plaintiffs, to maintain an action of this type. Thus, plaintiffs find themselves in the position of private litigants seeking to enjoin allegedly unlawful economic competition. Plaintiffs do not allege that the conduct of defendant bank or of the Comptroller is tortious, in breach of any contract, or violative of any of the anti-trust laws of the United States. Plaintiffs likewise are unable to allege that this action is founded on any statute of the United States which grants to plaintiffs immunity from competition. Plaintiffs do not allege that they are members of any class which is the beneficiary of protective legislation, nor do they claim the advantages flowing from any federally granted license, franchise, or monopoly.

In the absence of any of these allegations, which might give plaintiffs standing to maintain this action, their claim cannot survive the decisions of the Supreme Court holding that a party lacks standing to maintain a legal action where the only claimed financial loss is due to economic competition. In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1939), the Supreme Court observed, at p. 125:

> "It is by now clear that neither damage nor loss of income in consequence of the action of government which is not an invasion of recognized legal rights is in

itself a source of legal rights in the absence of constitutional legislation recognizing it as such."

In so doing, the Supreme Court was reaffirming what it had said a year earlier, in *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1938), at p. 137:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

To the same effect see *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1937); *Kansas City Power & Light Co. v. McKay*, 225 F. 2d 924 (C.A. D.C. 1955), cert. denied 350 U.S. 884; *Pennsylvania Railroad Co. v. Dillon*, 335 F. 2d 292 (C.A. D.C. 1964).

Standing is not conferred on plaintiffs by the Administrative Procedure Act, 5 U.S.C.A. 702, which has been construed to do nothing more than to continue the traditional requirements of standing by the provision that

> "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."

See *Duba v. Schantz*, 303 F. 2d 570 (8th Cir. 1962); *Rural Electrification Administration v. Northern States Power*

Cir., 373 F. 2d 686 (8th Cir. 1967), cert. denied 387 U.S. 947 (1967). See also, *Association of Data Processing Service Organizations* v. *Camp*, 279 F. Supp. 675 (D. Minn. 1968).

Nor is standing conferred on plaintiffs by the line of cases cited in their brief, such as *Frost* v. *Corporation Commission*, 278 U.S. 515 (1929); *Georgia Ass'n. of Independent Insurance Agents* v. *Savon*, 260 F. Supp. 802 (N.D., Ga. 1966), 268 F. Supp. 236 (1967); *Baker Watson Company* v. *Savon*, 261 F. Supp. 247 (D.C. D.C. 1966), appeal pending; *Investment Co. Institute* v. *Camp*, 36 L.W. 2204 (1967). Each of these cases involves either a franchise (*Frost* v. *Corporation Commission*, *supra*), specific legislation creating a legal right in the plaintiff therein (*Georgia Ass'n. of Independent Insurance Agents* v. *Savon*, *supra*), or making the plaintiff therein a member of a statutorily protected class (*Investment Co. Institute* v. *Camp*, *supra*). Plaintiffs have failed to show that any of these special considerations obtain in the instant case, which purely and simply seeks to enjoin unwanted economic competition.

I do not reach the other grounds relied on by the defendants in their motion for summary judgment, since it is clear that plaintiffs lack standing to maintain this action and it must be dismissed.

Judgment accordingly.

ANDREW A. CAFFREY
U. S. District Judge

SUPREME COURT, U. S.

JUN 11

JOHN F. DAVIS,

No. [redacted] 128

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

ARNOLD TOURS, INC., ET AL., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

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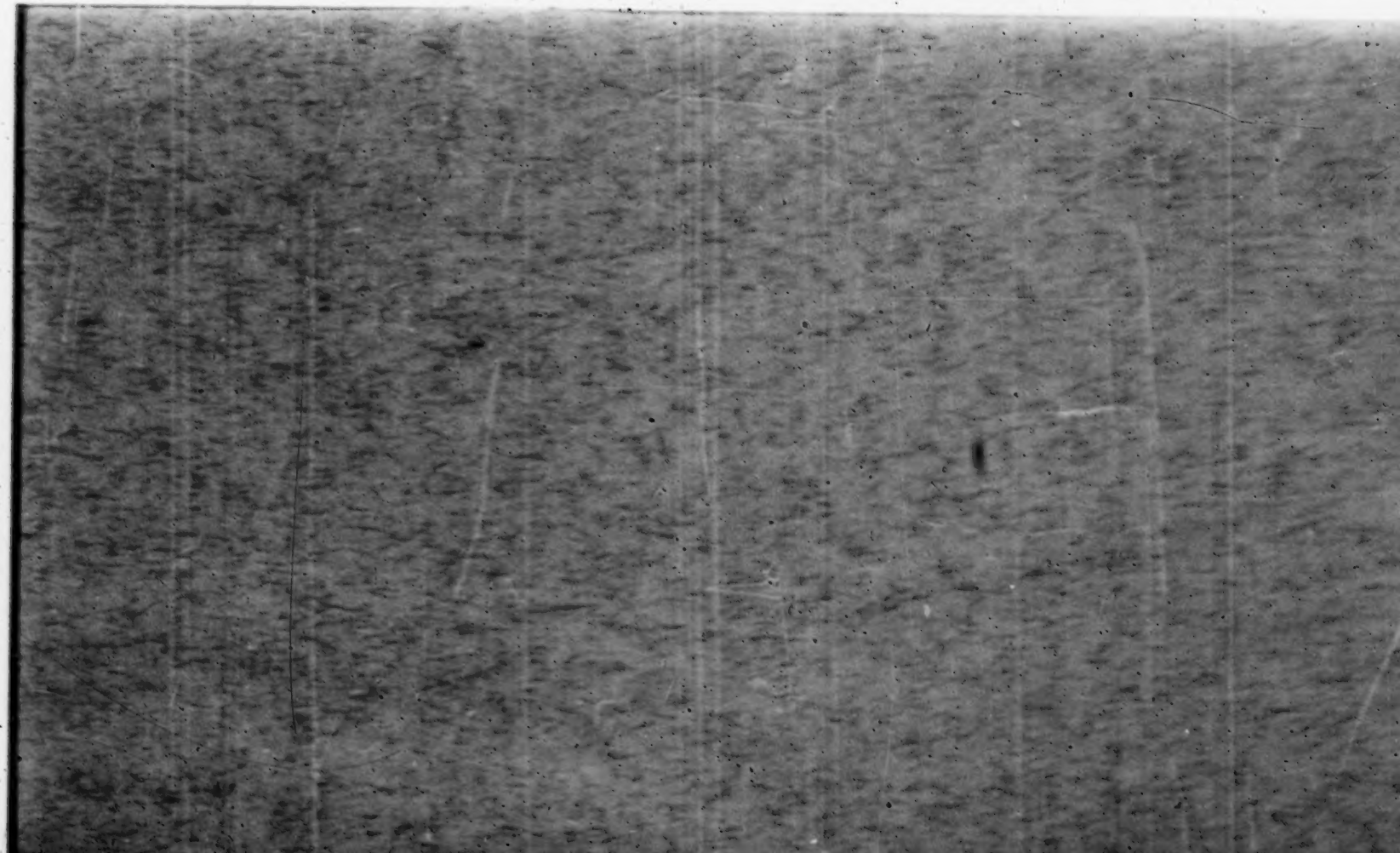

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1407

ARNOLD TOURS, INC., ET AL., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

OPINION BELOW

The opinion of the district court is reported at 280 F. Supp. 556. The opinion of the court of appeals (Pet. App. 1a–24a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1969. The petition for a writ of certiorari was filed on May 19, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. (1958 Ed.)

governmental license or franchise (see *Chicago v. Atchison, T. & S.F. R. Co.*, 357 U.S. 77; *Webster Groves Trust Co. v. Saxon*, 370 F. 2d 384 (C.A. 8)), or a congressional expression of intent to protect plaintiff's class from the competition sought to be prevented (*Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6-7). Congress may also by express statute permit such attacks in the public interest by "persons aggrieved" by designated governmental rulings. See, *e.g., Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-477. Absent one of these circumstances, a person whose only claim is that he is a competitor has no sufficient legal interest to enable him to invoke the judicial power to prohibit others from competing with him. See *Rowland Co. v. Hillsman*, 165 U.S. 166, 173-174; *Tennessee Power Co. v. TVA*, 306 U.S. 118, 137-140; *Pennsylvania Railroad Co. v. Dillon*, 335 F. 2d 203, 204 (C.A. 3), certiorari denied sub nom. *Interstate Hacienda S.S. Co. v. Dillon*, 379 U.S. 915; *Association of Data Processing Service Organizations, Inc. v. Camp*, No. 19276, decided February 6, 1969 (C.A. 8), rehearing en banc denied, March 5, 1969.

Quite last term, in *Hardin*, *supra*, 390 U.S. at 6, and in *Flast v. Cohen*, *supra*, 392 U.S. at 101-103, the Court re-examined and reaffirmed the doctrine that standing exists only where the plaintiff can demonstrate some nexus between his status and the purpose of the provision he alleges to have been violated. There can be no serious contention that the "incidental

powers" clause of the National Bank Act, 12 U.S.C. 24 Seventh, was designed to protect travel agents, or any other persons, from competition by national banks. It has never been contended that travel agents have a license or franchise of any kind protecting them from competition. Moreover, petitioners can point to no specific "person aggrieved" judicial review provision in the National Bank Act, such as was found sufficient in *Sanders*, *supra*, to allow a competitor to challenge a ruling under the Federal Communications Act. The court below properly held that the Administrative Procedure Act was not designed to achieve so substantive an alteration in the law of standing as petitioners assert. See, *e.g.*, *Rural Electrification Administration* v. *Northern States Power Co.*, 373 F. 2d 995, 999, 1003 (C.A. 8); *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931, 933 (C.A.D.C.).

2. There is no conflict of decisions among the courts of appeals that would warrant a grant of certiorari to consider the sweeping proposition for which petitioners contend. To be sure, the opinion of the Court of Appeals for the Fifth Circuit in *Saxon* v. *Georgia Assn. of Independent Insurance Agents*, 399 F. 2d 1010, stated, as an alternative ground for granting

standing to insurance agents attacking certain insurance services provided by national banks, that an objection to allegedly unlawful competition without more is sufficient to confer standing. But the court also found—applying the same general test applied by the First Circuit in this case—that a section of the National Bank Act (39 Stat. 753, 12 U.S.C. 92) limiting insurance activities of national banks had been enacted for the direct protection of insurance agents. 399 F. 2d at 1018. Since the court thus found a "statutory aid to standing", its decision did not depend on the court's alternative excursion into territory that has been closed by this Court's consistent and recently reaffirmed decisions. Under the circumstances, there is no conflict that would warrant further reconsideration of the established fundamental principles.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1969.

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JOHN F. DAVIS,

Supreme Court of the United States.

OCTOBER TERM, [redacted] 1969

No. [redacted] 128

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM R. CAMP ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF SOUTH SHORE NATIONAL BANK IN OPPOSITION.

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[redacted]

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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 1407.

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM B. CAMP ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF SOUTH SHORE NATIONAL BANK IN OPPOSITION.

Question Presented.

Does alleged economic injury which results from competition, in and of itself, confer standing on the alleged injured business to question the legality of any aspect of its competitor's operation?

Statement.

The gist of the broad sweep of the complaint is that the Comptroller of the Currency illegally authorized national banks to engage in the travel-agency business and that national banks therefore engage in illegal competition in furnishing travel services.

Furnishing travel services[1] has been a part of banking for nearly one hundred years (Affidavit of MacLeod, R. 28).[2]

Furnishing travel services is similar in nature to many other incidental services commonly performed by banks without specific statutory authority (Affidavit of Camp, R. 14-15).

A 1959 interpretative ruling of the Comptroller, Title 12 C.F.R. c. 1, part 7, Interpretation, § 7.1 (Affidavit of Camp, R. 13), was published in the Federal Register, vol. 24, p. 1989, in March of 1959, and provided in pertinent part:

> "It appears clear that national banks may, as an incidental power, provide travel services for their customers, as they have been doing for many years, and that they may have the reasonable rights and benefits that flow therefrom. . . .
>
> ". . . Ray M. Gidney
> "Comptroller of the Currency."

Comptroller Ray M. Gidney in 1959, after thorough study, thereby formally reaffirmed approval for national banks to provide travel services.

Paragraph 7475 of the Comptroller's Manual for National Banks (Pet. 44), provides:

> "7475. National banks acting as travel agents.
> "Incident to those powers vested in them under 12

[1] Wells Fargo and Company was well established in banking and express (cargo and passengers) about the time of the enactment of the National Bank Act in 1864. 28 Encyclopedia Americana, 621 (Int. Ed. 1963).

[2] References indicated "R" are to appendix to brief for plaintiffs, appellants, filed by the petitioners in the Court below. References indicated "Pet." and "Pet. App." are to the petition and to the appendix to the petition, respectively, filed by the petitioner in this Court.

U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection, therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶ 7376".

The District Court granted the defendants' motions for summary judgment on the grounds that the plaintiffs lacked standing to maintain the action (Pet. App.). On appeal, the Court of Appeals for the First Circuit affirmed on the same grounds (Pet. 12-24).

In its opinion (Pet. 12-24), the Court below held that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business unless:

a. The competition is unlawful apart from considerations of corporate power or authority; or

b. the complainant has a "legal right" to be free from the particular competition arising out of exclusive franchise, restrictive license or the like; or

c. the complainant has some "statutory aid to standing" including "judicial review" of the particular administrator in question for "parties aggrieved," "adversely affected" or the like (Pet. 14-16).

Both the District Court and the Court below held that the Administrative Procedure Act, 5 U.S.C. § 702, does not confer standing on the petitioners (Pet. App., Pet. 18-19).

Both Courts, in effect, held that the petitioners do not qualify for any of the special categories wherein a complainant has standing to attack his competitor's right to compete.

Furthermore, the petitioners admit that they ". . . are not the beneficiaries of a license, franchise, immunity statute or monopoly . . ."; that ". . . there is no specific statute protecting plaintiffs from competition . . ."; and that ". . . there are no express laws prohibiting national banks from engaging in the travel business . . ." (Petitioners' Brief, pp. 6 and 18).[3]

Argument.

Petitioners summarize that there are "many reasons why this case should be reviewed" (Pet. 8-9). They argue:

> "First, there are conflicting federal decisions on the main issue of standing as it relates to national banks and there are conflicting federal decisions on the subsidiary issue of standing relating to the interpretation and application of the *Flast* case and the Administrative Procedure Act, Sec. 10(a).
>
> "Second, this case involves an important federal question of national magnitude and of grave concern to our economic leaders. The time is ripe for a national decision involving the national banks."

Petitioner's second point, of which we shall treat briefly first, is irrelevant. ". . . [F]ederal question[s] of national magnitude and of grave concern to our economic leaders," where economic policy rather than law are involved, come within the jurisdiction of Congress. National decisions involving the national banks are and should be made only by the Comptroller of the Currency or by the Congress or by both—not the courts.

---

[3] These admissions are from the plaintiffs' brief filed in the Court below, a certified copy of which is filed herewith.

Petitioners must have well recognized this principle when they appeared before the House Committee on Banking and Currency as recently as May 2d to press vigorously for congressional action in the area of their concern (Hearings on H.R. 6778; Bill to amend Bank Holding Co. Act of 1956). This is the sixth attempt to induce Congress to act in this area. Since 1957, five bills have been unsuccessfully introduced in Congress to limit banks' powers including engaging in the travel-agency business (1957, H.R. 5415; 1959, H.R. 2424; 1963, H.R. 9548; 1965, H.R. 112, and 1967, H.R. 11077). These bills were referred to the House Committee on Banking and Currency and were never acted upon. Congress has had ample opportunity to act and has remained silent.

The petitioners do not distinguish between the economic merit of competition offered by national banks, the determination of which rests in the sole discretion of Congress, and the legal propriety of such competition which can only be reviewed by the courts after Congress has spoken.

Unless this Court is going to substitute itself for the Congress in deciding what policies should govern national banks, and whether or not travel agents are entitled to court protection from competition offered by national banks, this second reason given by the petitioners for requesting the Court to review this case is unfounded.

Their first reason that ". . . there are conflicting federal decisions on the main issue of standing as it relates to national banks . . ." runs head-on into the decisions of the District Court and the Court below.

Far from involving an important and novel question, this case is merely an example of the well-settled principle that mere unwanted competition does not give a complainant the right to compel the courts to police the marketplace.

The decision below involves no federal question in conflict with applicable decisions of this Court or any Court

of Appeals. On the contrary, the Court below has carefully sorted the pertinent decisions to illuminate the three paths which can lead to judicial review: illegal competition, invasion of a legal right to be free of the particular kind of competition, and statutory aid to challenge the particular kind of competition.

The petitioners point to no real conflict. Instead, they ask this Court, using *Flast* v. *Cohen* (1968), 392 U.S. 83, as a springboard, to jump to a conclusion that any time competition *per se* creates alleged adversity, standing is automatically conferred on a complainant. Such a holding would require a preliminary and anomalous finding that increased competition is an injury in fact. Allusion to the difficulty of this determination was made by the Court below in footnote 7 of its opinion (Pet. 19).

Applying the first category for standing, the petitioners fail to show that the act or manner of competing by the respondents is "illegal." "Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws" (Opinion, Pet. 15).

Related to this legal approach, a similar line also leads to the conclusion that the petitioners do not have standing. By their admissions, the petitioners have shown that there can be no illegal competition, in and of itself, in the travel business. They try to manufacture "illegal competition" out of their claims that national banks engage in the travel business without authority, that is, acting *ultra vires*. They do not distinguish between "illegal competition" and "acting ultra vires" as the courts have done. It has been conclusively held that competitors in a nonexclusive field have no right to seek protection from competition from others, even though the acts of the others are *ultra vires*

and not properly authorized. This was set forth in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), quoting at page 482 from *Railroad Co.* v. *Ellerman*, 105 U.S. 166:

> "'But if the competition in itself, however injurious,' we said, pp. 173-174, 'is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*?' The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business.'"

See *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 139-141 (1939).

Thus it is plainly clear that, even if petitioners could show that national banks were not granted the power to engage in the travel-agency business and that therefore the banks' activities are *ultra vires*, nevertheless, the petitioners cannot maintain this action because there is nothing that makes competition in the travel-agency business illegal.

The second category is where petitioners claim a "legal right" to be free from competition arising, generally, out of an exclusive franchise or a restricted license or the like. The petitioners claim no such exclusive right and even admit they have none (*supra*, p. 4). As the Court below said, "Plaintiffs fit in no such category." (Opinion, Pet. 15).

The final category requires that the complainant show that he has some "statutory aid" to standing. Decisions proscribing the activities of national banks in various fields of competition have relied upon specific, relevant statutes,

in the absence of which no standing would have existed. Those cases are readily classified under six different types of statutes.

They are:

(a) National Branch Banking.
Statute: 12 U.S.C. § 36 (c) (1) and (2).

(b) Chartering of National Banks.
Statute: 12 U.S.C. §§ 21, 22 and 26.

(c) Securities underwriting.
Statute: 12 U.S.C. § 24 (Seventh), and Glass-Steagall Act, 1933.

(d) Commingled investment accounts.
Statute: 12 U.S.C. § 92a, state banking law, and Glass-Steagall Act, 1933, 12 U.S.C. §§ 24, 78, 377 and 378.

(e) Insurance Agents, population under 5,000.
Statute: 12 U.S.C. § 92.

(f) Data Processing.
Statute: Bank Service Corporation Act, 76 Stat. 1132 (Wingate, Opinion, Pet. 21-23).

None of these statutes is claimed by or avails the petitioners. Therefore none of the decisions relying on these statutes could be in conflict with the decision of the Court below.

The most the petitioners can rely on is their interpretation of subparagraph 7 of 12 U.S.C. § 24, which, in relation to the power of a national bank, states in pertinent part: ". . . it shall have power . . . Seventh. To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . ." It is interesting to note in passing that the Supreme Court definition of "necessary," first enunciated by Chief Justice Marshall (*M'Culloch* v.

State of Maryland, 4 Wheat. 316, 413 (1819), and still in effect, is: "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another."

The petitioners cite no case in which a national bank has been prohibited from any field of competition *solely* upon this part of the statute. They cite nothing to show a congressional intent under this statute or any other statute to protect the travel business from competition by national banks or to limit such activity by national banks.

As the Court below pointed out (Pet. 17-18), Congress intended these limitations to be for the purpose of insuring the stability, liquidity and safety of the banks—not to protect competitors.

When in doubt as to whether or not the particular inhibitive statute was intended to protect others from competition from national banks, the courts have looked to congressional history and other statutes to judge the intent of Congress. See *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F. 2d 1010, 1017 (5th Cir. 1968). Congress has been faced with real, organized effort to amend the statute. And as previously set forth (*supra*, p. 5), Congress has had ample opportunity to act and has remained silent.

In any event, ". . . when legality itself is in dispute—when Congress has spoken at best with ambiguous silence—a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524 (1940).

The petitioners having failed to fit in any of the three criteria mentioned, the words of this Court in 1968 in *Hardin*

v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-6, answer the question presented:

> ". . . [E]conomic injury which results from lawful competition *cannot*, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations." (Emphasis supplied.)

Finally, this respondent submits that this case and these facts offer no cause for review by this Court, unless, under the guise of the petitioners' hoped-for new doctrine of "competitor standing," this Court desires to consider that the "standing categories" should be abolished. Were this to happen, every competing business, large or small, would have the right to complain in the courts against the acts of its competitors, and existing limitations on untrammeled litigation would disappear.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

ARNOLD TOURS, INC., ET AL. *v.* CAMP ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 128. Decided March 23, 1970

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the United States Court of Appeals for the First Circuit is vacated. The case is remanded to that court for further consideration in light of *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, and *Barlow* v. *Collins*, 397 U. S. 159.